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Reply-Brief of Defendant-Appellant on the Merits

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IN THE SUPREME COURT OF OHIO

APPEAL FROM COURT OF APPEAL OF

CUYAHOGA COUNTY

State of Ohio, :

Plaintiff-Appellee, :

-vs- : No. 34,615

Sam H. Sheppard, :

Defendant-Appellant. :

REPLY BRIEF OF DEFENDANT-APPELLANT ON THE MERITS

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TABLE OF CASES CITED

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ON THE MERITS

The prosecution has not returned the record of testimony to the Clerk of this Court, however, notes already taken of the record will suffice for this reply to the State's briefs on the merits.

The State endeavors to distinguish between communications made to the jury during its actual deliberation and those made to the jury between deliberation session but while under supervision of the Officer placed in charge until a verdict is returned.

The statute makes no such distinction. For instance, Section 2945.33 provides in part as follows:

> "When a cause is finally submitted * * * The court may permit the jurors to separate during the adjournment of court overnight, under proper cautions, or under supervision of an officer. Such officer shall not permit a communication to be made to them, * * * unless he does so by order of the court. * * *"
> (Underscoring ours)

The oath provided for such an officer in charge of a jury after the case is submitted to them is set out in Section 2945.32, and in part is as follows:

> "* * *You do solemnly swear * * * that you will not suffer any communications to be made to them, or any of them, orally or otherwise; * * * except by the order of this court, * * * ."

These mandatory provisions controlling the jury and the conduct of the officers in charge take effect immediately when the case is submitted to the jury. Such provisions are in full force, effect and controlling until the jury returns its verdict or is discharged by the court.

State v. Adams, 141 Ohio St., 423, at page 430, comments upon this situation in this language:

> "The fact that in this case the communication took place in the jury room rather than outside as in the case of Emmert v. State, supra, in the opinion of the court, presents a distinction without a substantial difference in legal effect or practical results * * * ."

Under this ground of error -- misconduct of jurors and the officials in charge of it -- it is established without any contradiction that the members of the jury themselves violated the orders of the court. The officials in charge of the jury permitted members of the jury time after time to call over the telephone whomsoever they desired, make their own connections, and converse with the other parties

without the official in charge knowing what was said to the juror. When defense endeavored to question the official about what he may have learned, prosecution objected and the court sustained the objection.

This was a flagrant violation of the provisions of two sections of the statutes expressly enacted to prevent exactly what occurred here, without let or hindrance. The court was ignored by the officials. These violations of the law by the officials in charge of the jury were committed without once seeking the advice and order of the court even though the officials had been expressly admonished by the court and took an oath that there would be no communications made to the jury without the knowledge and consent and supervision of the court. Either these statutes mean what they plainly say, and should be enforced or else they are to be ignored, made nugatory, and vain. The errors committed under this assignment of error were prejudicial as has been held by this court in the Adams case and by courts of last resort throughout the country. The rule established and followed in Federal Courts is even more strict than that in the State Courts. A violation of the statutes here must be presumed to be prejudicial. If lower courts and officials charged with a sacred duty are permitted to violate statutes as in this instance, then the jury system

is shorn of its sacredness and its integrity. When such flagrant violations of law occur then this Court should reverse. It is only by a reversal that our trial courts will have impressed upon them their duty to see to it that officials instructed and appointed by them perform their proper duty as required by law. This is a denial of due process of law. It should be observed that this was an extremely doubtful case. The jury was out five days and nights. The case was blazed across the headlines every day for months. Poisonous, vicious and false broadcasts filled the air and were heard by jurors. It was the topic of conversation at every place where more than one person assembled. There can be no doubt that the persons talking to the jurors mentioned the case. Upsetting conditions at home may have well been brought to the attention of the jurors which affected their attitude of mind.

We cannot emphasize or urge too strongly the prejudicial error committed in the charge of the court to the jury. We will again emphasize here the prejudicial nature of the courts charge upon the reputation of the defendant as to his general conduct and his propensities toward peaceful and quiet living. The charge on that point is found at pages 7006, 7007 of the record. The prejudice is created in this language of the court in its charge

as follows:

> "Some evidence has been given in this case concerning the claimed general conduct and reputation of the defendant and it is proper to present such evidence for your consideration. It is not admitted because it furnishes proof of guilt or innocence, but because it is a matter of common knowledge that people of good character and reputation do not generally commit serious or major crimes. * * * "

By this language the court emphatically charged the jury that reputation or general conduct was not to be considered or used in arriving at guilt or innocence. Such language is in direct violation of every decision on the subject. It is contrary to the statutes of Ohio made and enacted for the control of trials. Section 2945.04, Revised Code of Ohio, in the definition of reasonable doubt states the following:

> "* * * It is that state of the case which, after the entire comparison and consideration of all the evidence, * * * "

The statute in unmistakable language requires that the jury give full and fair consideration to all the evidence. By the charge of the court in this cause the jury was not permitted to consider all of the evidence in arriving at its verdict. Again, the defendant has been denied due process of law. Here, sticking out like a sore thumb, is a direct admonition by the court to the jury that it shall not consider reputation as to general conduct in

arriving at its verdict of guilt or innocence.

In its brief on the merits the State again refers to the T shirt. The emphasis given the jury about the T shirt by the State made it one of the outstanding features of the evidence. The State has taken three distinct and separate positions on the matter of the T shirt. In the trial the State claimed that the T shirt was covered with blood and that therefore the defendant got rid of it some way. That was its position before the Court of Appeals. In the Appellant's brief on the motion for leave to appeal it was pointed out that such a spray of blood going downward, outward and upward would most assuredly have gotten on the upper part of the trousers of the defendant, if he were the killer, but there was not one vestige of blood on the upper part of the trousers or belt of the defendant. In its answer brief on the motion the State made its first shift in its theory about the T shirt. At page 86 of its brief on the motion the State said:

> "It may well be that defendant's T shirt sufficiently covered the upper part of his trousers."

During the oral argument on the motion for leave to appeal it was demonstrated that blood on the thin cotton porous material of a T shirt would immediately penetrate through and get on the trousers. When queried by the Court

on this point the Prosecution had no explanation then to make. In the trial court the State agreed that the defendant was wearing trousers. It so agreed in its brief on the motion for leave to appeal. Now more than a year after the trial the State in its answer brief on the merits concludes that the defendant did not have any trousers on. Just where does the requirement of proof that the circumstances must point unerringly to guilt and exclude every reasonable hypothesis of innocence apply?

Let us discuss the last theory -- the no trousers on -- theory now advanced by the State. The evidence established that on the second floor and east of the bedroom of Mr. and Mrs. Sheppard was Dr. Sheppard's dressing room. There was a light in this room all night. When retiring it was the custom of defendant to go to this dressing room, remove his clothes and attire himself in night apparel and then go to the bedroom. Under the most recent theory of the State it is now claimed -- or must be claimed -- that the defendant went to his dressing room, removed his trousers, his shorts, his socks, and his shoes, because no blood was found on any of these articles excepting a spot of blood on one knee of the trousers. He did not remove his T shirt according to the State and thus clad with an armless T shirt and nothing else on, he went in and

killed his wife. Such lack of attire would expose his bare arms and his bare limbs. The thin cotton T shirt would be little protection to a woman's fingernails. There was a violent struggle. That is agreed by both parties. At page 70 of the State's brief contra motion for leave to appeal is this language referring to the victim:

> "One fingernail from the left hand of Marilyn Sheppard was practically torn off and this may well have resulted from such a struggle."

The evidence also discloses that her fingernails were packed and embedded with foreign material. She scratched her assailant most vigorously. She was fighting for her life and it is readily understood that a woman would scratch and scratch with all of the strength that she had. Mrs. Sheppard was an athletic young woman, vigorous and strong. Yet in all of this struggle, according to the testimony of Officers Schottke and Gareau who examined the defendant at the hospital on the morning of July 4th, there was not a single scratch on his arms or his limbs. There was no mark made by fingernails on him. He had a bruise over one eye obviously administered by a heavy object and another severe bruise at the top of the cervical spine. There was no scratch. What is a reasonable inference? Had the defendant committed this crime attired as the State now says he was, there would have been many scratches and marks

on his arms and limbs and probably his body.

There were found two pieces of leather described in the evidence of different sizes that obviously came from a leather jacket. These were scratched out by the victim. Dr. Sheppard did not have a leatherette jacket or any other leather about the house that matched these two pieces found under the bed. One such piece was found on July 5th, the other piece somewhat later. A proper and logical inference may be drawn that if a man practically naked committed this horrible crime there would have been some scratches about his body, arms or legs as a result of this violent death struggle.

Two pieces of tooth were found on the victim's bed when her body was removed. Dr. Gerber, the Coroner, finally determined that these pieces of tooth were Marilyn's. The State's testimony establishes that the teeth were not broken off by any external blow to the face, otherwise the teeth would have fallen down into her throat. At page 1806 of the record the State pathologist testified:

> "Q. And the way that these teeth were broken off and the wound inside the mouth without any external wounds, indicated that something had got into the mouth; hadn't it?
>
> "A. Certainly."

From the facts in the record a reasonable inference may be drawn. The assailant was delivering repeated blows about the head of the victim. She was struggling violently to resist the attack. She screamed. The assailant placed his hand over her mouth and a finger penetrated into the mouth and between the teeth. The victim clamped down on this finger and it was jerked out violently, thereby precipitating the broken teeth outwards and onto the bed where they were found. The assailant's finger would surely have been severely lacerated and caused much blood to emerge. There was not a scratch on the defendant's hands or fingers. The blood on the defendant's wristwatch later found in the green bag, and the blood on the victim's wristwatch over the face and links, was not the blood of Marilyn Sheppard according to the State's pathologist. She did not find any of the O group -- which was Marilyn's -- smeared over either the wristwatch of the victim or the wristwatch of the defendant. It is reasonable to infer that the assailant's finger having been severely lacerated, his blood would have been smeared over both wristwatches. The blood was not that of the defendant. That the defendant's wristwatch was violently jerked off his wrist is indicated by physical damage to one of the links in the bracelet of the watch. A man removing his own wristwatch does not jerk

it off with such violence. The State complains that the defendant does not explain this or that. It isn't the obligation of the defendant to make any explanation at all. It is the duty of the State to present evidence sufficient to convict beyond a reasonable doubt. However, the defendant offered himself time after time freely and voluntarily to the most severe interrogation. He was interrogated in the hospital on the morning of July 4th and for days thereafter. The Coroner arranged a Roman Holiday in a gymnasium or auditorium of the high school and announced that the defendant would be called upon to testify. We have never heard of an inquest so advertised as this. At any rate, probably a thousand or more people gathered and there for five hours the defendant sat on the witness stand and every intimate act of his whole life was pryed into. The questioning was not confined to the cause of the death of Marilyn Sheppard as was the duty of the Coroner to ascertain, but open to every conceivable inquiry into his whole life. He submitted to that. All day and into the evening while in the County Jail he submitted to interrogation by police officers.

It should be noted that a person entering from the street side of the house would pass through the kitchen to the stairway leading upstairs. Such a person would not see

the defendant lying on a couch against the wall along the stairway in the living room.

At page 108 of the State's brief on the merits, an error of the trial court is pointed out in this language:

> "In 39 American Jurisprudence, page 101, Section 86, it is stated:
>
> "' * * * if it does not appear that the jurors have read the newspaper, a verdict will not be set aside merely because articles were published during the trial which were likely to influence the jury.'
>
> "Annotated under this statement is the case of Fields v. Dewitt, 71 Kansas 676, 81 P. 467, 6 Ann. Cas. 349, in which it was held that where articles discussing the merits of a case are shown to have been published during the trial in newspapers of general circulation in the community, it cannot be presumed upon review, against the finding of the trial court, that they were read by the jury, <u>if there is no direct evidence to that effect</u>."

It is of record that two members of the jury listened to and heard the vicious, false broadcast of Walter Winchell saying that the defendant, Sheppard, had had a mistress in New York who bore him a son who later died; that the woman was arrested for complicity in robbery. There it is established as a matter of record that the jurors or some of them, rather, did listen to vicious, false broadcasts about the merits of the case. The court later refused to ask the jury if it had listened to further vicious broadcasts comparing the defendant to Alger Hiss. The last

phrase of the quotation from the State's brief is "if there is no direct evidence to that effect." There is direct evidence in this record that members of the jury did listen to a vicious and false broadcast heaping calumny upon the defendant.

This is a doubtful case. The three shifts of the State relative to the T shirt shows that even the prosecution does not know what ground it will take or what premise it will assume in that vital feature of the evidence. The two teeth jerked out of the victim's mouth with no laceration on the fingers of the defendant again casts doubt upon the verdict. The frantic search to match the leather found under the bed -- the bits of leather -- and the failure of the prosecution to find any leather that would match these two bits of leather cast further doubt upon the case. The finding of the green bag long after an intense search had been instituted and found in the position where the brush had been cut down and beaten down under where the bag was found would indicate that it was not tossed into the brush during the night, but was placed there after the brush had been beaten down and cut away. The blood on the defendant's wristwatch was not the blood of the victim, nor his. Whose was it? It was the blood of the assailant who jerked the wristwatch off of the defendant's wrist to cover up the

crime of the real assailant. The grievous injuries of the defendant which could not have been simulated nor self-inflicted cast further doubt upon the case. The State's theory, the State's claim that certain blood was on the stairway failed because blood probably was dropped there during the years of the occupation of the house by the Sheppards and their predecessors. At any rate, the blood obviously was not fresh because there was no blood whatsoever upon the shoes of the defendant. Blood does not wash off.

In spite of the broadcast heard by certain members of the jury, the violently hostile press, and the general confusion attendant upon the trial by photographers, the jury was out five days and also some night sessions. It did not return a verdict of first degree murder, but did return a verdict of second degree, which means life. There was doubt throughout the whole case, it is saturated with doubt. Therefore, it appears that this Court should then scrutinize very carefully the many, many errors pointed out in the briefs filed in this Court. There were wholesale unsupervised telephone communications between members of the jury and outsiders. The calls were put through by the jurors. The doctrine of the Adams case, supra, is that such communications being in direct violation of the

statutes of Ohio creates a presumption of prejudice toward the defendant. The State made no effort whatsoever to remove this presumption but on the other hand by objections which were sustained thwarted the efforts of defendant's counsel to find out what, if anything, the jurors may have reported to the bailiff in charge relative to what may have been said to them over the telephone. The George Washington phase of the court's charge that because Washington happened to be on the driveway with an axe on his shoulder, he probably cut the cherry tree down is a deadly comparison with the case that Sheppard being in the home he therefore killed his wife.

This being an extremely doubtful case, the court's charge on the general reputation for conduct of the defendant as to peace and quiet was highly prejudicial. The jury was not allowed to consider that evidence in arriving at a verdict of guilty or innocent. The defendant was deprived of his constitutional rights. He was denied due process of law. The evidence of the State and of the entire record not being legally sufficient to support a verdict of guilty beyond a reasonable doubt, the defendant should have judgment entered for him and he should be forthwith discharged.

If the court should not agree with that conclusion then certainly there is prejudicial error requiring reversal of the verdict and a new trial.

Respectfully submitted,

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Three (3) copies of this brief
mailed to the

Prosecuting Attorney of Cuyahoga
County, Ohio, this 12th day of April, 1956.

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